UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, and BLACK ENTERTAINMENT TELEVISION LLC Plaintiffs, v. YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC., Defendants.	Case No. 07CV-2103
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO., et, al., on behalf of themselves and all others similarly situated: Plaintiffs, v. YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC., Defendants.	Case No. 07CV-3582

****HIGHLY CONFIDENTIAL****

Videotaped Deposition of DEAN GARFIELD
Washington, D.C.
Tuesday, November 2, 2009
10:24 a.m.

BY: Okeemah S. Henderson, LSR
JOB NO. 18039

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Orit Michiel

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I-N-D-E-X

Deposition of DEAN GARFIELD

November 2, 2006

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P-R-O-C-E-E-D-I-N-G-S

(10:24 a.m.)

10:23 THE VIDEO OPERATOR: This is the beginning of tape No. 1 in the videotape deposition of Dean Garfield taken by Mr. Baskin in the matter of Viacom International Incorporated, et al versus YouTube, Incorporated. Case No. 07-CV-2103 and the Football Association Premier League Limited Bourne Company, et al. versus YouTube Incorporated, et al in the United States District Court for the Southern District of New York.

This deposition is being held at Jenner & Block, LLP, 1099 New York Avenue, Northwest Washington, D.C. on November 2nd, 2009. The time is approximately 10:24. The Court Reporter is Okeemah Henderson. The video camera operator is Conway Barker, both on behalf of David Feldman Worldwide. Will counsel please identify yourselves and state whom you represent.

MR. BASKIN: I am Stuart Baskin of Shearman & Sterling, and I am counsel for Viacom in this litigation.

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10:24 MR. PLATZER: Luke Platzer of Jenner & Block, also counsel for Viacom in this litigation.

10:24 MS. MCMILLEN: Lauren McMillen of Bernstein Litowitz Berger & Grossmann, counsel for the Football Association Premier League Limited and other class plaintiffs in this litigation.

10:25 MR. DESANCTIS: Michael DeSanctis of Jenner & Block with the Viacom plaintiffs.

10:25 MR. MCGILL: David McGill from Mayer Brown, here on behalf of YouTube and Google.

10:25 MR. KLAUS: Kelly Klaus from Munger Tolles & Olsen appearing on behalf of the witness, and with me is Orit Michiel of the Motion Picture Association of America.

10:25 THE VIDEO OPERATOR: Would you please swear in the witness.

Whereupon,

DEAN GARFIELD,

called as a witness, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

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EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. BASKIN:

10:25 Q. Good morning, sir. Could you recite your full name for the record?

10:25 A. Certainly. It is Dean, D-E-A-N, Christopher Garfield, G-A-R-F-I-E-L-D.

10:25 Q. And which state do you reside in, sir?

10:26 A. I reside in Washington, D.C.

10:26 Q. How are you currently employed?

10:26 A. I'm employed by the Information Technology Industry Council.

10:26 Q. What is your position with the Information Technology Industry Council?

10:26 A. We simply call it ITI. I'm the president and CEO.

10:26 Q. And without belaboring, since this is not of direct relevance to the suit, can you tell us what the ITI does?

10:26 A. ITI is the premiere voice, advocate, thought leader for the information communications technology sector. We represent the major household name brands before global policymakers.

10:26 So our member companies include --

10:26 actually all of the technology in this room is
10:26 made by those companies. So IBM, HP, Dell,
10:26 Apple, Microsoft just to name a few. We have
10:26 43 members.
10:26 Q. How long have you been president and
10:27 CEO of ITI?
10:27 A. For about eight months.
10:27 Q. And prior to that -- strike that.
10:27 Can you just tell the ladies and gentlemen of
10:27 the jury a little bit about your educational
10:27 background and what degrees you hold?
10:27 A. I can. How far back do you want me
10:27 to go?
10:27 Q. I don't think we have to go to
10:27 kindergarten. Why don't we start with college.
10:27 A. College, I went to Middlebury
10:27 college and I received a BA. Post then went to
10:27 grad school and law school, so Woodrow Wilson
10:27 School at Princeton. I have a masters in
10:27 public administration international affairs and
10:27 jointly with that went to law school at NYU
10:27 where I received my JD.
10:27 Q. Just briefly again, can you walk us
10:27 through your employment crinology after you
10:27 received your educational degrees?

10:27 A. Post my law postgraduate degree, I
10:28 worked at a firm in New York, Kaye Scholer
10:28 Fierman Hays & Handler, worked there for six
10:28 and a half years approximately.
10:28 Q. That would be a law firm?
10:28 A. Yes. Correct. Post working at Kaye
10:28 Scholer both in New York and Washington, D.C.,
10:28 I worked at the Recording Industry Association
10:28 of America representing the major U.S. record
10:28 labels.
10:28 After that I moved on to working for the
10:28 Motion Picture Association of America
10:28 representing the major and motion picture
10:28 companies and then about nine months ago, left
10:28 there to work at ITI.
10:28 Q. Are you currently married, sir?
10:28 A. Yes, I am.
10:28 Q. Do you have any children?
10:28 A. Yes, I do. I have two children and
10:28 one wife.
10:28 Q. You mentioned that prior to working
10:28 for the Motion Picture Association, which we'll
10:28 get to in a few minutes, you worked for an
10:29 organization called the Recording Industry
10:29 Association. Did that go by initials also?

10:29 A. Yes, it does. It went by and it still does go by RIAA.
10:29 Q. In brief again, what was your position with the RIAA?
10:29 A. I think it changed over time but essentially I was a litigator and at some point, I think I was the head litigator or something like that.
10:29 Q. How long did you remain with the RIA RIAA?
10:29 A. Four years.
10:29 Q. During the course of this trial, the jury will see some documents referencing something called Grokster. Could you in brief just tell the jury -- do you know what Grokster, what the reference is a court case named Grokster?
10:29 A. Yes, I do.
10:29 Q. Were you involved with that court case?
10:29 A. Yes, I was.
10:29 Q. Can you just again, not belaboring it, for 30 seconds just advise the ladies and gentlemen of the jury what Grokster is so that when they hear reference to it they know what

it means?

A. Grokster was a litigation that was filed jointly by the Recording Industry Association and the Motion Picture Association against a company that developed a software tool that encouraged users to engage in copyright infringement.

Q. During your time as principal lawyer for the RIAA, did you have responsibilities include addressing issues of copyright infringement and policy?

A. Yes, it did.

Q. Now, you mentioned after your four years or so at the RIAI (sic) you moved over to an organization called the Motion Picture Association, correct?

A. Yes. I worked at the RIAA for about four years and then moved to MPAA.

Q. MPAA and the acronym stands for Motion Picture Association of America; is that correct?

A. Correct.

Q. What companies comprise the MPAA?

A. The MPAA consists of the major U.S. motion picture companies but they are also the

10:31 global leaders in developing and marketing
10:31 motion pictures.
10:31 Q. I think the jury may be familiar
10:31 with some of the names. Can you just recount
10:31 for us some of the names of members of the
10:31 MPAA?
10:31 A. Sure. So our members included
10:31 Disney, Sony, Warner Brothers, Universal, and I
10:31 suspect that I'm leaving out someone.
10:31 Q. Does Century Fox refresh your
10:31 recollection?
10:31 A. Thank you. Jim Gianapolis
10:31 (phonetic) and Peter Turner will be pleased
10:31 that I forgot their company, yes, so Fox is
10:31 also one of our members. And at some point in
10:31 time we had other members but some of those
10:31 companies (inaudible).
10:31 Q. Would it be fair to summarize it for
10:31 the jury that the constituency of the MPAA is
10:32 essentially the major film studios that create
10:32 movies and many TV shows?
10:32 A. Correct.
10:32 Q. And by the way, one studio that you
10:32 did mention was also Paramount, correct?
10:32 A. Yes.

10:32 Q. And that one you understand is owned
10:32 by my client, Viacom; is that correct?
10:32 A. Correct.
10:32 Q. What were your responsibilities --
10:32 A. That's why I said including just so
10:32 I wouldn't offend anyone.
10:32 Q. What was your position, sir, at the
10:32 MPAA?
10:32 A. My role at the MPAA also changed
10:32 over time, just as it did at the RIAA. When I
10:32 came into the MPAA, I was essentially the head
10:32 litigation attorney and then over time it
10:32 progressed, and when I left I was an executive
10:32 vice president and the chief strategic officer.
10:32 So I came in in a legal role. I continued
10:33 to have a legal role for much of my career
10:33 there but my title changed and I took on
10:33 broader responsibilities over time.
10:33 Q. Was one of your responsibilities at
10:33 the MPAA addressing issue of piracy of movies
10:33 and television shows on the internet?
10:33 A. Yes, it was.
10:33 Q. Now, can you just explain again
10:33 briefly, you need not belabor it but for the
10:33 ladies and gentlemen of the jury, why the film

10:33 studios that comprise the MPAA are concerned
10:33 with issues of piracy or legal content on the
10:33 internet?
10:33 A. Well, the in simplest terms,
10:33 creating a movie is a very expensive
10:33 investment. When I was at the MPAA, the
10:33 average cost for a movie was over $105 million
10:33 and so it was a significant investment made and
10:33 certain expectations and plans for recouping
10:34 that investment over time through legitimate
10:34 channels.
10:34 So to the extent that those creative works
10:34 were being exploited in nonlegitimate channels,
10:34 it would reduce the likelihood of getting a
10:34 return on that investment.
10:34 Q. If I could direct your attention to
10:34 the year 2006, did you personally engage in
10:34 discussions with a company called YouTube?
10:34 A. Yes, I did. I know that I did in
10:34 2006 but the exact timing in 2006 is not
10:34 something that I recall.
10:34 MR. BASKIN: Now, let me hand you
10:34 just as a matter of dating the context. Let me
10:35 hand you what I would ask the Court Reporter to
10:35 mark as Garfield Exhibit 1.

10:35 (Garfield Deposition Exhibit No. 1 was marked
10:35 for identification.)
10:35 BY MR. BASKIN:
10:35 Q. It's a short document, Mr. Garfield.
10:35 So just if you take a second if you will and
10:35 look at Garfield Exhibit 1.
10:35 A. (The witness complies.) Okay.
10:35 Q. Now, first, sir, just for the record
10:36 can you identify for us and confirm that
10:36 Garfield Exhibit 1 consists of a document
10:36 reflecting an E-mail chain in which you were a
10:36 participant in or around April, 2006?
10:36 A. Correct.
10:36 Q. Does this document -- does Garfield
10:36 Exhibit 1 help to establish in your mind that
10:36 you were in discussions with YouTube at least
10:36 in and around April, 2006?
10:36 A. Yes, it does.
10:36 Q. Can you just tell briefly, the
10:36 ladies and gentlemen of the jury, what was
10:36 generally the topic of your discussions with
10:36 YouTube in and around April, 2006?
10:36 A. The discussion was about encouraging
10:37 YouTube to do two things; deal with content
10:37 that we identified on the site that was

10:37 copyrighted, infringement content from the
10:37 motion picture studios; and two, and relatedly
10:37 integrating filtering software that would
10:37 address that copyrighted content.
10:37 Q. Now, as of April, 2006 did the MPAA
10:37 find that a substantial amount of the film
10:37 studios copyrighted content was being exhibited
10:37 on the YouTube website?
10:37 MR. MCGILL: Objection. Leading.
10:37 A. In April, 2006 there was a lot of
10:37 copyrighted content on the site that was owned
10:37 or controlled by the motion picture studios and
10:37 that was one of the reasons I reached out the
10:37 YouTube.
10:37 BY MR. BASKIN:
10:37 Q. Now, you made reference two answers
10:37 ago to a desire to institute discussions
10:38 regarding filtering on the YouTube website. If
10:38 you look at Exhibit 1 for a second, you will
10:38 see on a couple of places, certainly in the
10:38 first on the top E-mail and on the very bottom
10:38 E-mail, you make reference to technical
10:38 discussions or technical folks, or instituting
10:38 technical folks into the dialogue.
10:38 Was that a reference to individuals'

knowledgeable of the issue of filtering and fingerprinting technologies?

A. Correct.

MR. MCGILL: Objection to the characterization of the document.

A. Correct. As I mentioned, there was a two-fold purpose to the discussion and one of the purposes was to talk about integrating filtering technology software. And so I think on that very first call, I was the only one participating while YouTube had other folks and I wanted to make sure folks from our side who had the technical expertise were also part of the discussion.

BY MR. BASKIN:

Q. Now, I think the second E-mail on Garfield Exhibit 1 references at least three participants of YouTube. Was one such participant a man named Chris Maxcy, M-A-X-C-Y?

A. Correct. Yes.

Q. Do you recall what Mr. Maxcy's title was at YouTube at the time or what his position was?

A. I don't recall what his title was. I was introduced to Chris as a result of Chris

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wanting to build a stronger relationship with the Motion Picture Association and conversations he had with Dan Glickman, so I followed up with him based on that.

Q. Then there was reference to two other individuals, a Steven Chen. Do you see that, sir?

A. Yes, I do.

Q. And a Zahavah Levine?

A. Yes, I do.

Q. Mr. Chen is denominated by Mr. Maxcy as co-founder and chief technology officer of YouTube. Was that your understanding in April of 2006?

A. I don't recall if I had an understanding in April, 2006.

Q. And Ms. Levine, Zahavah Levine is identified as general counsel and vice president of business affairs. Was that your understanding in that time period?

A. I did have an understanding of Zahavah's role because I knew Zahavah even before this conversation.

Q. You knew her prior to her arrival at YouTube?

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10:40 A. Yes, I did.

10:40 Q. Now, you mentioned a concept which you referred to as filtering or fingerprinting and the jury may sometimes here it at copyright identification tools. Based on your experience at the RIAA and the MPAA, were you familiar with many of the filtering technologies that were available as of the middle of 2006?

10:41 A. Yes, I was.

10:41 Q. Was there one such company that employed or deployed filtering technology called Audible Magic?

10:41 A. Yes.

10:41 Q. Were you in 2006 familiar with Audible Magic technology?

10:41 A. Very.

10:41 Q. In laymens term and briefly, can you explain to the ladies and gentlemen of the jury what these filtering and fingerprinting technologies what they do? Assuming what they did in 2006 and I'll just add if it's changed a lot since then, then you can tell us. But going back to 2006, can you explain to the ladies and gentlemen of the jury what these filtering technologies or fingerprinting

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technologies did?

A. Actually, fingerprinting technologies is an apt way to describe it because they work in a very similar fashion to a human fingerprint. So just as can recognize a human fingerprint, they way they would work is they would take a digital stamp of a file, in this context an audio-visual file, capture that visual, that fingerprint and then in subsequent occasions be able to tie the fingerprint to the particular audio-visual content.

So it's a way of identifying a piece of content beyond just the name of the movie or the song.

Q. I assume companies like Audible Magic use computers and technology to do these matches?

MR. MCGILL: Objection to form.

A. They do use computer and other technologies in order to be able to align a particular audio-visual work with its digital fingerprint.

BY MR. BASKIN:

Q. Now, in and around 2006, had the

10:43 MPAA assessed the effectiveness of filtering on fingerprint technologies in protecting the movie industry's intellectual properties on internet websites that deploy those technologies?

MR. MCGILL: Objection to form. Vague.

A. The MPAA did conduct an analysis. I don't recall the exact timing of that analysis and whether it were concluded in April of 2008. I'm sorry 2006.

BY MR. BASKIN:

Q. In 2006 and for that matter into 2007, do you know what was the MPAA's assessment of the effectiveness of fingerprinting and filtering technologies in protecting the movie industry's intellectual property on websites that deploy those technologies?

MR. KLAUS: If I can just interpose it's not an objection but in the course of answering the question, Mr. Garfield, if I could just caution you to confine your responses to matters that were publically discussed or discussed with others and not to

10:44 reveal internal communications that may be work product.

MR. BASKIN: I will strike the question. That's a fair reservation on the part of your counsel. Let me phrase it this way:

In 2006 and 2007, from time to time you discussed with the press the MPAA's assessment of effectiveness of fingerprint technologies; isn't that right sir?

MR. MCGILL: Objection. Leading.

A. I do have a recollection of speaking to the press and generally publically about fingerprinting technologies at some points in 2006. Yes.

BY MR. BASKIN:

Q. And again without belaboring the deposition, can you tell the ladies and gentlemen of the jury what you remember were the positions you were expressing to the press in and around that time period regarding the effectiveness of these fingerprinting and filtering technologies if websites chose to deploy them?

MR. MCGILL: Objection. Vague.

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10:45 A. In simplest terms, the technologies were highly viable and were worthy of further investment and integration into audio-visual sites that have an interest in discerning between content that's copyrighted and content that's not.

BY MR. BASKIN:

Q. Now, let's return if we can to your discussions with YouTube in 2006, and at first, I want to focus on the time period before its acquisition by Google. Do you have -- well, let me show you some documents, maybe that would help you differentiate between those two time intervals. But in your discussions with YouTube in 2006, you said you were you've already testified you were tempting to discuss with them their deploying filtering and fingerprinting on their website; is that correct?

MR. MCGILL: Objection to the characterization.

A. It was one of the things that we were talking about. Correct.

BY MR. BASKIN:

Q. And let me show you if I can just so

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we can date it. Let me show you a document that we'll mark as Garfield Exhibit 2, mostly for the purpose of dating your discussions. I understand your memory is not crisp on the dates. Is that a fair way of characterizing it?

A. That's a fair characterization. I have a firm recollection of much of our conversations but the exact dates I don't have a strong grasp on.

MR. BASKIN: Let me hand you if I can what we'll mark as Garfield No. 2.

(Garfield Deposition Exhibit No. 2 was marked for identification.)

BY MR. BASKIN:

Q. Sir, first can you identify for us Garfield Exhibit 2 as consisting of again an E-mail chain of which you were a participant?

A. Yes, I can.

Q. Now, using Garfield Exhibit 2 as really as a dating mechanism, is it accurate that your discussions with YouTube regarding instituting, filtering or fingerprinting on their network, on their website persisted certainly into August, 2006?

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10:49 A. Yes, it did.

10:49 Q. Do you recall during this time period whether the MPAA was discussing with YouTube particular fingerprinting and filtering vendors that YouTube might deploy on their website to protect intellectual property of movie studios?

10:50 A. My recollection is at some point in these conversations we talked about a range of technology companies that were competing in the content recognition, fingerprinting phase, and so yes, I don't recall discussing one company with them. I recall talking to them about a range of companies.

10:50 Q. And I'll show you some documents in a few minutes that might help refresh your memory but do you recall even absent some documents whether one such company was Audible Magic that you were discussing with them?

10:50 A. Yes, I do recall that.

10:50 Q. Let me show you and just so I understand the protocol in the case.

10:50 David, I'm going to be showing him a Google document now, which happens to be an E-mail chain with him but because as I

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understand that that's even though it's denominated highly confidential for purpose of the deposition, the stipulation allows us to show witnesses documents, but I want to show it to you to make sure you're comfortable in showing it to him before I do. Okay?

MR. MCGILL: Sure. I appreciate that.

MR. BASKIN: So why don't we mark as Garfield Exhibit 3 the document in my hand. I'm going to give YouTube's counsel a copy. I will not give out any other copies until -- I might give one to co-counsel.

MR. MCGILL: You can go ahead and mark it. We have no objection.

(Garfield Deposition Exhibit No. 3 was marked for identification.)

BY MR. BASKIN:

Q. Does Garfield Exhibit 3 help you refresh your recollection when you have lunch? But beyond that, can you identify Garfield Exhibit 3, although it is not a document from the MPAA, can you identify it again as a document consisting of an E-mail chain in which you are a participant in and around September,

10:53 2006?

A. Yes.

Q. And based on that, can you confirm that your discussions with YouTube regarding instituting possibly filtering systems continued into September, 2006?

A. Yes, I can.

Q. Now, if you look at the very last E-mail on the chain, you'll see that Mr. Maxcy, Chris Maxcy, wrote to you on and about September 25th. "We are very close to getting our fingerprinting systems licensed and wanted to take you up on your offer to do some testing of your members." Do you see that?

A. It says testing for your members. I don't know if that makes a difference but.

Q. You're right. Thank you for that. But the question that I have for you, as you sit here today, do you recall which fingerprinting system Mr. Maxcy advised you they were very close to licensing as of the end of September, 2006?

MR. MCGILL: Objection to the characterization of the document.

A. I don't recall.

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BY MR. BASKIN:

Q. Now, I could represent to you that YouTube, the acquisition of YouTube by Google for approximately $1.7 billion was announced in early October, 2006 and my question for you is, sir, am I correct that this testing described by Mr. Maxcy on Garfield Exhibit 3 did not occur as of October, 2006; is that correct, sir?

MR. MCGILL: Objection. Lacks foundation.

A. We did not engage in a testing with them as of October, 2006.

BY MR. BASKIN:

Q. So just so the record is clear, for the ladies and gentlemen of the jury, in the six or seven months between April, 2006, which was I believe the date on Garfield Exhibit 1 and October, 2006, did YouTube ever agree to use available filtering technologies to protect the film industry's content on its website?

MR. MCGILL: Objection to form. Also lacks foundation.

A. I'm sorry. Could you read the question back?

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BY MR. BASKIN:

Q. In the six months between the time you started the negotiations in April until the acquisition by Google in October, and we're going get to what happened post acquisition, would it be fair to say that YouTube never agreed to use available fingerprinting technologies on its website to protect the MPAA's members in intellectual property?

MR. MCGILL: Same objections.

A. To the best of my knowledge they had not agreed to do that.

BY MR. BASKIN:

Q. Now, in fact in the course of your negotiations with YouTube prior to the acquisition by Google, did you have a conversation with YouTube executives on the topic of why they would not filter?

MR. MCGILL: Objection. Lacks foundation.

A. We had multiple conversations about that topic. Yes.

BY MR. BASKIN:

Q. And do you recall prior to October 2006 -- strike that. Can you describe to the

BY MR. BASKIN:

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BY MR. BASKIN:

Q. And do you recall prior to October 2006 -- strike that. Can you describe to the

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10:56 ladies and gentlemen of the jury as best you
10:57 can recall what reason you were given by
10:57 YouTube executives or executive, and we'll hash
10:57 out who that was in a second, as to why they
10:57 were not filtering in and around in 2006.
10:57 MR. MCGILL: Again objection. Lacks
10:57 foundation.
10:57 A. So just if I can disaggregate that a
10:57 bit. There were ups and flows in the
10:57 conversation with YouTube where they at various
10:57 points in time over that six-month period, I
10:57 think it was expressed an interest but never
10:57 came to a firm agreement on integrating any
10:57 content recognition or fingerprinting
10:57 technologies.
10:57 At some point in those discussions when
10:57 asked what's taking so long and why hasn't this
10:57 progressed to an actual agreement, there were a
10:58 range of reasons given including the fact that
10:58 the copyrighted content on YouTube was a major
10:58 lure for their users. I don't remember the
10:58 exact date of that conversation, but I firmly
10:58 recall that conversation and that being one of
10:58 the reasons offered.
10:58 I do also recall that there were

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10:58 additional reasons. I don't recall what all of
10:58 those other reasons were but that one stood out
10:58 in my mind.
10:58 BY MR. BASKIN:
10:58 Q. And who communicated to you as best
10:58 you can recall that a reason for not signing up
10:58 with filtering was because copyrighted content
10:58 on YouTube website was serving as a lure for
10:58 the users?
10:58 MR. MCGILL: Objection.
10:58 Mischaracterization.
10:58 A. My conversations with YouTube often
10:58 included multiple people, so I don't recall
10:58 specifically. I do recall that in that
10:58 conversation I think Zahavah Levine and Steve
10:59 Chen were a part of that discussion. And I
10:59 also recall that there was a third person who
10:59 was a technology, someone with a technology
10:59 expertise.
10:59 I don't recall which person specifically
10:59 said that but I do recall very strongly that
10:59 that was one of the reasons offered. It stood
10:59 out in my mind.
10:59 BY MR. BASKIN:
10:59 Q. Now, do you recall whether among the

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other reasons that you mentioned being recited to you was the notion that having copyrighted content on their website provided YouTube with a leverage in its negotiations with the movie studios?

MR. MCGILL: Objection. Leading.

A. I don't recall.

BY MR. BASKIN:

Q. Now, after Google's acquisition of YouTube, again I represent to you it happened in October, 2006, it was announced at least I think, the merger was consummated thereafter but it was announced in early October, 2006. Did you engage in discussions with YouTube/Google on the topic of instituting, filtering or fingerprinting on the YouTube website?

A. Close to the acquisition or the announcement yes. Absolutely.

MR. BASKIN: Just so we can date things and put a little flesh on the bones, let me show you what we will mark as Garfield Exhibit 4.

(Garfield Deposition Exhibit No. 4 was marked for identification.)

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11:03 A. Okay.

BY MR. BASKIN:

Q. Mr. Garfield, first once again can you identify for us Garfield Exhibit 4 as consisting of an E-mail and attachment or an adjunct of an E-mail that was sent by you to Mr. Maxcy at YouTube in and around October 12, 2006?

A. Yes, I can.

Q. Now, by the way, did Mr. Maxcy ever tell you how it felt to be rich?

A. I don't recall. I recall that we had some phone conversation but it was largely in jest.

Q. Now, you will see attached at the bottom of Garfield Exhibit 4 there is something called denominated as a proposal through October 13, 2006 copyright identification and filtering pilot test. Do you see that, sir?

A. I do.

Q. Was this a test and a proposal that you were proffering to Google and YouTube in or around October, 2006?

A. Yes.

Q. Can you in your own words maybe in

11:04 laymen's language explain to the ladies and
11:04 gentlemen of the jury what were the basic
11:05 content of this proposal that you proffered to
11:05 YouTube and Google in and around October, 2006?
11:05 MR. MCGILL: Objection. The document
11:05 speaks for itself?
11:05 A. As I mentioned before, the way
11:05 content recognition technologies generally work
11:05 at a high level is just like fingerprinting.
11:05 So with the fingerprint, you take a
11:05 fingerprint, that fingerprint is connected with
11:05 a particular person.
11:05 In simplified terms the same content works
11:05 with consent recognition which is take a
11:05 digital fingerprint of a file and that's
11:05 associated with that file, that has a name.
11:05 And the idea was integrating that same, those
11:05 same technologies into the publication process
11:05 at YouTube/Google.
11:05 So as we understood in advance of a file
11:05 making it up on the site after a user submits
11:05 it, YouTube engaged in certain processes and we
11:06 were suggesting simply integrating content
11:06 recognition into those processes as a way of
11:06 recognizing and then removing unless they were

otherwise licensed, copyrighted motion picture content.

Q. Now, if I could direct your attention in particular to the second page of Garfield Exhibit 4, there's reference to MPAA test. Do you see that, sir?

A. Correct.

Q. And in particular the proposed test contemplated using Audible Magic's music filtering service in the test. Had you learned by then that that was the fingerprinting technology that Google and YouTube were instituting or had a license institute on the site?

MR. MCGILL: Objection. Mischaracterization of the document.

A. I did learn at some point in time that Audible Magic and YouTube had a business relationship and that YouTube was working with Audible Magic. I don't recall the exact date and this document doesn't help me to recall.

BY MR. BASKIN:

Q. Do you recall, it's not in the document, maybe you have an independent recollection, do you recall approximately the

otherwise licensed, copyrighted motion picture content.

Q. Now, if I could direct your attention in particular to the second page of Garfield Exhibit 4, there's reference to MPAA test. Do you see that, sir?

A. Correct.

Q. And in particular the proposed test contemplated using Audible Magic's music filtering service in the test. Had you learned by then that that was the fingerprinting technology that Google and YouTube were instituting or had a license institute on the site?

MR. MCGILL: Objection. Mischaracterization of the document.

A. I did learn at some point in time that Audible Magic and YouTube had a business relationship and that YouTube was working with Audible Magic. I don't recall the exact date and this document doesn't help me to recall.

BY MR. BASKIN:

Q. Do you recall, it's not in the document, maybe you have an independent recollection, do you recall approximately the

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cost of engaging in this test what it would have cost YouTube and Google to use Audible Magic's service for purposes of this test?

MR. MCGILL: Objection. Calls for speculation.

A. I don't recall the call structure for Audible Magic. I knew it at one point but I don't recall what it was, but my recollection was at some point we spoke to YouTube/Google about us deferring the cost.

In fact in the memo one of the things that it points out is minimizing the out-of-pocket expense. So I know that I was always mindful of not just with YouTube but with all of our and my overtures to use a generated sites like YouTube was to make sure that whatever we propose were dealing with copyright infringement was cost efficient for the site, if you will. So not adding a significant, new expense to their operating cost and that was the same in this context with YouTube.

Q. And I'm going to show you in a second a second iteration from this proposal from about a month later. Do you recall whether your offer to have the MPAA defray the

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BY MR. BASKIN:

Q. Nothing further except for one line in the document. If you turn in the middle of the first page you will see that Mr. Kelly Liang wrote, "We look forward to launching a content filtering pilot with the MPAA some time towards the end of the year." Do you see that, Mr. Garfield?

MR. MCGILL: Objection. Document speaks for itself.

A. Yes, I do see that.

BY MR. BASKIN:

Q. And do you remember who Mr. Liang was at this point in time? I think he was introduced in an earlier E-mail?

A. I do recall. My recollection was that Chris transitioned some of the conversation and his involvement to Kelly who in addition to I think having some business role also had some technical expertise and so there were other folks from Google/YouTube who continued to be a part of the conversation but Kelly helped to drive a lot of it over this ladder part of the year.

MR. BASKIN: Now, in that period, I'd

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like to show you next what we will mark as Garfield Exhibit 7.

(Garfield Deposition Exhibit No. 7 was marked for identification.)

A. I traveled a lot when I worked at the MPAA, that's clear from these E-mails. So I'm ready. I have reviewed it.

MR. BASKIN: You mean you physically traveled to --

A. Yes. Every evening it says I'm on the road or I'm traveling here or traveling there.

BY MR. BASKIN:

Q. First, can you identify for us Garfield Exhibit 7 as an E-mail and accompanying proposal that you E-mailed to Kelly Liang in and around November 8, 2006?

A. Yes.

Q. Now, based on the E-mail paragraph beginning Hi Kelly, it makes reference to "I am attaching below a revised proposal based on our last discussion as well as the RFI we discussed." Do you see that, sir?

A. I do.

Q. Can you just explain, first of all

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11:21 to the ladies and gentlemen of the jury, what
11:21 the reference to RFI is?
11:21 A. The reference to RFI is a reference
11:21 to a request for information and I don't know
11:21 if that's an apt term, it's a term that we used
11:21 at the time. It was really a request for
11:21 proposals in around that time the MPAA
11:22 sponsored and ran a request for proposals
11:22 around content recognition technologies.
11:22 Q. And as you sit here now, other than
11:22 the reference in that paragraph do you recall
11:22 the proposal dated November 9, 2006 was a
11:22 result of your discussions with Mr. Liang?
11:22 A. Yes. There were changes in the
11:22 document that reflect our conversation and some
11:22 of those changes are reflected in the end of
11:22 the document.
11:22 Q. For example, if you turn to page
11:22 that's Bates, the second page of the document,
11:22 it appears that the test period from the first
11:22 proposal to the second has grown from 30 to 45
11:22 days. Is that one of the changes that you were
11:22 just referring?
11:22 A. Yes, it is, as well as coming up
11:22 with Key Metrics, which I recall that YouTube

and Google were interested in and we are were as well, so it wasn't a huge deal to agree that's something that should be included.

Q. Can you tell again the ladies and gentlemen of the jury what you mean by Key Metrics, what that phrase refers to?

A. It was an attempt to have clarity going into the pilot and how we would evaluate whether the tests worked and were successful, and so defining the measurements up front would prevent misunderstandings midway or after the pilot.

Q. Now, there is a reference under test parameters one of the metrics was number fingerprints generated from manual review (blacklist and white list). Do you see that?

A. I do.

Q. The reference to blacklist or white list was also found in a couple of bullet points above that you'll see as well. Can you explain to the ladies and gentlemen of the jury what was meant by blacklist and white list?

MR. MCGILL: Objection. Calls for speculation.

A. I was the one who was largely

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drafting this document, so I can tell you how I was using the terminology. So there I guess there are multiple ways but two popular ways of dealing with recognizing content and then filtering it in or out. So the filtering process is essentially like a strainer and so you have content going through the strainer; some things make it through the strainer and some things end up being caught in the strainer.

If you take a blacklist approach, then you identify a list of stuff that should be excluded out and that should be caught in the strainer. If you take a white list approach, you create a list of stuff that should make it true as opposed to a list that should be kept out. That's the blacklist versus white list. Was that clear?

Q. Well, we're going to go into it a little bit more but it was certainly a good first articulation. So let's take it a little bit further. If I understand your answer, you were saying that the blacklist would consist of fingerprints of videos which the studios would disapprove for uploading and hence would be

captured by the strainer; is that correct, sir?

A. Correct.

Q. And by contrast, the white list would consist of fingerprints of videos which the studios authorized or approved for uploading and hence, they would pass through the strainer; is that correct?

A. Correct.

Q. Why might a studio choose to have a white list, have it placed on a white list -- strike that. Why might a studio choose to have placed on a white list videos that were authorized to be uploaded on the website?

A. Well, I can just tell you what I knew based on my using the language which is that there were, it was simply a recognition of fact that the studios were authorizing and doing deals with sites like YouTube, Google where they would authorize certain content to be used.

So in order for this to be effective so as not to train out or eliminate content that the studios actually wanted to make available on any of these sites, we would have that approach of having a white list.

Q. So to sort of sum up for the jury, the second proposal after your discussions with Mr. Liang contemplated that this fingerprinting and filtering technology would be used to distinguish between videos that were uploaded with authorization and videos that should be blocked because they were uploaded without authorization; is that correct?

MR. MCGILL: Objection to the characterization and the leading nature.

A. I'm sorry. I just misheard you. Could you just say it again? I just want to make sure I heard you properly?

BY MR. BASKIN:

Q. This proposal as of November, 2006 contemplated using fingerprinting and filtering technology to distinguish between videos that were being uploaded with the permission of the studios versus videos that were being uploaded without authorization and permission?

MR. MCGILL: Same objection.

A. Yes. Correct. That was the contemplation. Just one thing on Kelly Liang. We've been saying mister. I don't recall if Kelly is a man or a woman. Sorry.

pilot and their filtering processes would be used for their business partners and those who established a licensing relationship with Google/YouTube but not with the studios generally.

BY MR. BASKIN:

Q. The jury may not understand what you mean or what they meant by the fact that the technology, the filtering technology would be reserved for their business or licensing partners. Can you explain to the ladies and gentlemen of the jury what that means, sir? What was meant by licensing and business partners?

A. The way I interpreted it was we were having a conversation earlier about the white list and the blacklist and filtering and filtering out. The studios developed, marketed movies, television shows, they then make a decision on partners with whom they're going to exploit those copyrighted works, so market and distribute those copyrighted works.

So Google essentially conveyed that they would work on getting authorization from the studios and licenses from the studios and

11:39 others and those who would license, they would then in the context of that licensing arrangement work in integrate filtering. But for those companies who were not and did not develop a licensing arrangement with Google, they weren't going to be doing this sort of a pilot initiative or filtering.

MR. BASKIN: I think we have to break for the tape. Shall we break for the tape now?

THE VIDEO OPERATOR: This is the end of tape 1. Off the record at 11:39.

11:49 This is the beginning of tape 2 in the deposition of Mr. Garfield. On the record at 11:49.

BY MR. BASKIN:

Q. Sir, again to help you with the dates a little bit. Let me show you what we will mark as Garfield Exhibit 10.

(Garfield Deposition Exhibit No. 10 was marked for identification.)

A. Okay. I have read it.

BY MR. BASKIN:

Q. Sir, first, again can you identify for us Garfield Exhibit 10 as consisting of an E-mail chain in which you were a participant

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12:11 date?
12:11 A. Just to be clear, I left the MPAA in
12:11 at the end of 2008, so it was about a year, a
12:11 little over a year after the case was filed I
12:11 was gone. So we talked about it intermittently
12:11 but it wasn't a constant topic of conversation
12:11 and the MPAA wasn't involved in the litigation,
12:11 so there wasn't a reason for me to talk about
12:11 it a lot or frequently.
12:11 Q. I take it the reason that you have
12:11 spoken with him on occasion about it was
12:11 because Paramount pictures was one of the
12:11 member studios of the MPAA; is that correct?
12:11 A. Correct. Correct.
12:11 Q. And I think we established this
12:11 already, Paramount is owned by Viacom?
12:11 A. Correct.
12:11 Q. I think you testified earlier that
12:11 your position at the MPAA was executive vice
12:11 president but did you also hold the title of
12:11 chief strategic officer?
12:11 A. Yes, I did.
12:11 Q. And when did you get that title if
12:12 you can recall?
12:12 A. My recollection was that it was

late -- I would like to say it was late 2005 but I really don't recall. I'm sorry.

Q. Now, putting aside the specific issue of this litigation I take it that in your capacity as chief strategic officer for the MPAA you were in regular communication with Viacom about copyright enforcement issues; is that fair to say?

A. Yes. That's fair to say.

Q. And what are some of the topics that you would discuss within that overall framework with Viacom?

MR. KLAUS: I would just caution you that in the course of your communications with Viacom, to the extent those reflect privileged communications you should not reveal them and if you have a question about how far down from the very general topic of copyright enforcement do some specific topics go, that's something we can step outside and try to disentangle.

MR. MCGILL: Just to make sure the record is clear, your position is that any privileged information that was related to Viacom from the MPAA would retain its privileged nature?